No. 34528-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA V. FOWLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF SPOKANE

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The constitutionally deficient, erroneous "to convict" instruction was manifest error.

As argued in Appellant's opening brief, because the error in the "to convict" instruction relieved the State of its burden of proof, it was of constitutional magnitude. AOB at 8-9. It is thus reviewable under RAP 2.5. *State v. O'Hara*, 167 Wn.2d 91, 102, 217 P.3d 756 (2009) (requiring analysis of whether the jury instruction shifted the burden or whether some other constitutional interest was at stake to determine whether the unpreserved error was of constitutional magnitude).

Respondent argues that this error was not "manifest." BOR at 11. To be "manifest" the record must reflect the facts necessary to adjudicate the claimed error on appeal. *State v. Malone*, 193 Wn. App. 762, 767, 376 P.3d 443 (2016). In this case, the error—a misstatement of the law in the "to convict" instruction— is readily reviewable because it is a plain misstatement of the law. A misstatement of law that relieves the State of its burden is precisely the type of error that should be readily apparent to the trial court judge and is the type of error this court reviews on appeal without regard to whether it was raised below. *See O'Hara*, 167 Wn.2d at 108 ("the error must have practical and identifiable consequences apparent

on the record that should have been reasonably obvious to the trial court.").

The State confuses "invited error" with unpreserved error in claiming that because the defense did not propose its own instructions, it invited the court's erroneous "to convict" instruction. BOR at 13. *State v. Hood* specifically corrects a trial court that similarly mischaracterizes the defendant's non-filing of instructions as "joining" the State's proposed instructions. *State v. Hood,* 196 Wn. App. 127, 134-135, 382 P.3d 710 (2016), *review denied,* 187 Wn.2d 1023, 390 P.3d 331 (2017). Like in *Hood,* here there was no joinder with the prosecution's proposed instruction; the defense simply did not propose its own. RP 254. This may be unpreserved error subject to RAP 2.5 review, but it is not invited error.

2. The error in the "to convict" instruction relieved the prosecution of its burden to of proof, and the State cannot prove, beyond a reasonable doubt, that this error did not contribute to the verdict.

The State attempts to recast the error defining the requisite mental state in the "to convict" as an issue of style rather than substance, describing it as deficient simply because it lacks "clarity." BOR at 18. This misstates the problem. The specific way in which this language reduces the standard of proof was recognized in *State v. Sherman*, 98 Wn.2d 53, 57, 653 P.2d 612 (1982); AOB 5-7.

The State cites no authority for its proposition that "the court may look to other instructions to determine whether the 'to convict' instruction sufficiently stated each element of the offense." BOR at 19. To the contrary, the Washington State Supreme Court instructs, "[w]e are not to look to other jury instructions to supply a missing element from a 'to convict' jury instruction." *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010); *see also State v. Clark-El*, 196 Wn. App. 614, 618, 384 P.3d 627 (2016) (the "to-convict instruction must include all essential elements of the crime charged.").

Regardless, here, the misstated mental state was not something that was readily apparent to the jury as was the case in *Sibert*, where the omission of methamphetamine from the "to convict" instruction did not affect the verdict because the charging document named the controlled substance, the controlled substance was defined in the jury instructions, it was the only controlled substance the prosecution proved through expert testimony, and the only controlled substance talked about by either party during closing arguments. *Sibert*, 168 Wn.2d at 261, 269, 271. In Mr. Fowler's case, the misstatement of the required mental state in the "to convict" instruction simply could not have been cured by the evidence presented at trial; thus the State cannot establish that it did not affect the jury's verdict.

The State wrongly claims that Mr. Fowler admitted guilt to the offense of eluding police. BOR at 19. The State acknowledges in a footnote that the defense raised the central element at issue in the offense of attempting to elude—the "question as to how reckless his driving was." RP 302; BOR at 19. Thus the question for the jury was whether Mr. Fowler in fact drove in reckless manner as defined by law—an element that the State was required to prove beyond a reasonable doubt, and which Mr. Fowler contested at trial. RP 302. The fact of wanting to get away from police, as testified to by Mr. Fowler, does not mean that he drove recklessly to do so. Unlike in *Sibert*, where there was no question of the drug that was at issue, here there was a question of whether Mr. Fowler's driving while trying to avoid police was in fact reckless.

Because this is constitutional error, the standard of review is whether the State can prove "beyond a reasonable doubt, that the error did not contribute to the verdict." *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)(citing *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)); AOB at 8. Because Mr. Fowler in fact contested the State's charge that he drove in a reckless manner, and there was little detail about Mr. Fowler's driving behavior presented at trial, the State fails to meet this burden. Reversal is required.

3. There is no question that the officer's testimony in which he used the precise language of the elements of the offense to describe Mr. Fowler's conduct was constitutional error subject to RAP 2.5 analysis.

As detailed in Appellant's opening brief, the repeated, explicit use of the words "recklessly," and "eluding" by Officer Vigessa invaded the province of the jury because these are the elements of the offense that the jury was charged with deciding—not Officer Vigessa. AOB at 12-14. The State tries to characterize Officer Vigessa's language describing Mr. Fowler's conduct as simply words "any member of the jury would recognize." BOR at 23. However, the fact that elements of the offense are also commonly used words does not undo that fact that their use here by Officer Vigessa invaded the province of the jury and deprived Mr. Fowler of his right to a jury trial.

B. CONCLUSION

The State simply cannot establish that the error in the "to convict" instruction that relieved the State of its burden of proof did not affect the jury's verdict. This is especially true in light of the officer's impermissible opinion testimony about Mr. Fowler's guilt. Reversal of his conviction for attempting to elude a police vehicle should be reversed.

DATED this 15th day of September, 2017.

Respectfully submitted,

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v.	)	NO. 34528-9-III
	)	
JOSHUA FOWLER,	)	
	)	
APPELLANT.	)	

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Appellate Court Case Title:	State of Washington v. Joshua Vincent Fowler
Superior Court Case Number:	14-1-03172-7

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